No. 286.
Brf. of Wilson for Appellant.
Filed Nov. 13, 1900.

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*vs.*

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## BRIEF FOR APPELLANT.

### STATEMENT OF THE CASE.

The situation is anomolous. The facts developed in the record here and the case of appellant reported in *State vs. Davis*, 53 Pac. R., 678, indicate as complicated a tangle of facts and theories as can be found in the history of Western Jurisprudence.

The appellant contends that he has been selected as a vicarious sacrifice to appease the hatred the sheepmen of Idaho bear for the men of cattle.

Cassia county, Idaho, is a stock country. Its dominant industry is raising sheep, though large and valuable cattle ranges extend well into its southern borders. The cattle men claimed that the sheep men were trespassing upon their ranges. Frequent disputes and intense feeling existed between the two classes and passages at arms had resulted on more than one occasion

Such were the conditions when on the 17th or 18th of February 1896, the bodies of John C. Wilson and Daniel Cummings were found on a cattle range. The state of the bodies and surroundings indicated that the men had been dead about two weeks, and that homicide had been committed. The appellant was a cattle man who had had frequent alternations with sheep men over (what he claimed was) their trespasses upon his range. It was ascertained that he had been within about sixteen miles of the scene of the killing about the time it was believed the homicide had been committed. He was arrested. An information charging him with the murder of John C. Wilson was filed on April 5th, 1897. On April 7th,

1897, the trial of the case was commenced, and on April 15th, 1897, the jury empaneled, upon purely circumstantial evidence, found him guilty of murder in the first degree; whereupon the appellant, on April 24th, 1897, was sentenced to be hanged on June 4th, 1897. His motion for a new trial was denied, and on May 6th, 1898, the judgment of the lower court was affirmed by the Supreme Court of the State. On September 12th, 1898 (at the next session of the District Court,) the appellant was resentenced to be hanged on October 28th, 1898. On July 25th, 1898, the appellant filed his application for pardon with the Board of Pardons of Idaho, and on the 19th, of that month, the board continued the hearing until December 1st, 1898, and requested the Governor to reprieve appellant until December 16th, 1898. On October 20th, 1898, the Governor reprieved appellant until December 16th, 1898. On the 5th of December, 1898, the board continued the matter until the next regular meeting of the board, and granted appellant a reprieve until February 1st, 1899. On January 23rd, 1899, the Board of Pardons finally denied the application. The appellant thereupon petitioned the United States District Judge of Idaho, at Chambers, for a writ of habeas corpus, upon the ground that petitioner was being deprived of his liberty and threatened with deprivation of life without due process of law, and contrary to the Fourteenth Amendment of the Constitution of the United States, and from an order denying the writ prayed for, made January 30th, 1899, took an appeal to the United States Circuit Court of Appeals for the Ninth Circuit. The District Judge made an order staying execution pending the appeal. On October 16th, 1899, the United States Circuit Court of Appeals dismissed the appeal on the ground that inasmuch as the question raised by the appeal involved a construction of the federal constitution, that court was without jurisdiction in the premises. (See Davis v. Burke, 97 Fed. Rep. 501).

Appellant was about to be again sentenced to death by the Judge of the State court wherein he was tried and convicted, when, with the consent of the Attorney General of Idaho and by permission of the Circuit Court, he filed in that Court the petition for a writ of habeas corpus set forth in the transcript.

## ASSIGNMENTS OF ERRORS.

The appellant will rely upon, and hereby specifies, the following particulars, as showing wherein the lower Court erred, to-wit:

1. That there is not and never has been any indictment or presentment to a Grand Jury against your said petitioner charging him with murder, but he has been charged, held to answer, imprisioned, tried for and convicted of murder and sentenced to be hanged and is now threatened with death, under and by virtue of an *information* filed in the District Court of Cassia County, State of Idaho, on the 5th day of April, 1897 by the District Attorney of the Fourth Judical District of this State of Idaho, and not otherwise.

(a). That the only authority for so holding, trying, convicting, sentencing, imprisoning and threating said prisoner which exists, lies in Section 8 of Article I of the Constitution of said State of Idaho and in a pretended act of the legislature of said State entitled, "An Act to Provide for Prosecuting Offenses on Information, and to Dispense with the Calling of Grand Juries, except by order of the District Judge": Approved March 13th, 1891; and herein, 1st., said Section of the Constitution of the said State is not self executing but required and requires supplementary legislation by the legislature of said State before it could or can become operative; and 2nd, the said pretended act of said legislature which is called the Information Act of March 13th, 1891, was and is invalid and void because it was not passed in accordance with the provisions and requirements of the Constitution of said state relating to the passage of bills, to-wit: Section 15 of Article 111 of said Constitution.

(b). That when said petitioner was so held, imprisoned, tried, convicted and sentenced, or any thereof, there was no law of said State authorizing or permitting prosecutions by information for murder, or in any capital case or for any felony whatever.

(c). That in so holding, imprisoning, trying, convicting and sentencing said petitioner, and in each of said acts, said District Court was without jurisdiction, and all and every of said acts was and is illegal and void.

(d). That said petitioner has been and is being restrained of his liberty and threatened with deprivation of life without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States.

(e). That said Circut Court erred in holding and deciding that said Section 8 of Article I of the Constitution of said State, and said Information Act of March 13th, 1891, or either thereof, constituted or constitutes a sufficient authority or any authority for so holding, imprisoning, trying, convicting, sentencing and threatening said petitioner, and for restraining him of his liberty and threatening him with deprivation of life, or for any act or proceeding against him in the premises, or at all; and herein said Circut Court erred in not holding that said section of said State Constitution is not self-executing, but is dormant until given vitality and force by supplementary and appropriate state legislature; and erred in not holding and deciding that said Information Act was and is invalid and void because it was not passed in accordance and in compliance with the requirements of Section 15 of Article III of the Constitution of said State, and in not holding and deciding that the Constitution of said State alone confers no authority, and that the legislature of said state has never provided any procedure, machinery; rules or method, for prosecuting in murder cases or for prosecuting said petitioner, or depriving him of his liberty, or in any wise proceeding against him by information.

(f). That said Circuit Court erred in upholding the validity of the authority exercised by said State Court and by the said District Attorney and by the Sheriff of said Cassia County, whereby said petitioner has been and is being restrained of his liberty, and threatened with death by hanging, and in not deciding that said authority and the exercise thereof was and is repugnant to the Fourteenth Amendment to the Constitution of the United States.

(g). That said Circuit Court erred in holding and deciding that said petitioner had been duly and legally held, imprisoned, tried, convicted and sentenced, and in holding and deciding that said petitioner has been and is being restrained of his liberty and threatened with death by hanging by and in accordance with the Con-

stitution of the State of Idaho and the Constitution of the United States, and by due process or law; and in not holding and deciding that said District Court in each and every of said steps and proceedings against said petitioner was, is, and must remain wholly without jurisdiction; that said District Court has and its officers have acted in contravention of the Fourteenth Amendment of said Federal Constitution, in that said petitioner has been and is being by said Court and said officers, denied the equal protection of law and deprived of his liberty and has been sentenced to death and is about to be executed, without due process of law.

(h). That said Circuit Court erred in refusing to grant said petitioner's application for a writ of habeas corpus, and in not discharging said petitioner from custody and restoring him to liberty.

2. Your petitioner says that in the records and proceedings herein there is further manifest error, to-wit:

That all of the laws of the State of Idaho providing for or applicable to the punishment of persons convicted for murder, and of all persons or criminals convicted of capital offenses or of any felony, where repealed and rendered void subsequent to the offense imputed to said petitioner and charged against him by said so-called information, by an act of the legislature of said State, which was passed, approved and became the law of said State relating to or providing for the punishment or execution of persons convicted and sentenced to imprisonment in the State prison, or to suffer the death penalty, on the 23d of February 1899.

That said act and law of February 23rd, 1899, imposed different and additional penalties and punishments from those provided by the laws of said State in force when the crime charged against said petitioner is alleged to have been committed; deprives said petitioner of rights that he had at said time and changes the manner and character of punishment then in force, to his prejudice.

(a). That said Circuit Court erred in not holding and deciding that said act and law of February 23rd, 1899 is, as to said petitioner, inoperative, because it is *ex post facto* and therefore contrary to Sections 9 and 10 of Article I of the Constitution of the

United States as well as Section 16 of Article I of the Constitution of the State of Idaho.

(b). That said Circuit Court erred in not holding and deciding that the laws of said State relating to the punishment of condemned criminals, as aforesaid, have been repealed since the commission of the offense with which said petitioner is charged; no longer exist and cannot be made operative, as to said petitioner, for any purpose whatever.

(c). That said Circuit Court erred in holding that Section 159 of the Revised Statutes of Idaho constitute and is a general saving clause, the effect of which is to keep alive, as to said petitioner, the laws of said State relating to the punishment of condemned criminals as aforesaid, which were in force when the homicide imputed to petititioner was committed, and which were repealed by said act of February 23d, 1899, and in holding that said punishment laws are still in force as to said petitioner and that he may be restrained of his liberty, deprived of his life, or at all punished thereunder.

(d) That said Circuit Court erred in not holding that said petitioner cannot be punished under said act of February 23, 1899, because it is *ex post facto* as to him, nor under the laws which said act repeal because there is no saving clause either in said act, or in the general laws of the State, and said repealed laws therefore are void.

(e). That said Circuit Court erred in not holding that there is no law in the State of Idaho under which said petitioner can be punished.

(f). That said Circuit Court erred in not holding that by the passage and enactment of said act of February 23d, 1899, the said District Court lost all jurisdiction to sentence, punish, or further restrain said petitioner of his liberty, and that, because of said act, said petitioner has been and is deprived of his liberty without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

(g). That said Circuit Court erred in refusing to grant the application of petitioner for a writ of habeas corpus and in dismissing

said writ and in not discharging said petitioner from custody and in not restoring him to liberty.

POINT ONE.

The appellant above named was held to answer, tried, convicted of murder, and sentenced to be hanged, under and by virtue of an information filed in the District Court of Cassia County, Idaho, by the District Attorney of the Fourth Judicial District of that State, and herein the appellant contends:

First: That Section 8 of Article 1 of the Constitution of Idaho is not self-executing, but required legislative action before it could become operative.

Second: That the Information Act of March 13th, 1891, was and is invalid and void, because not passed in accordance with the requirements of the Idaho Constitution.

Third: That, there being no law for prosecutions for information in capital cases, the District Court was without jurisdiction, and therefore,

Fourth: That the trial, conviction and sentence were illegal, null and void; contrary to the fourteenth amendment of the Constitution of the United States, and derogatory to the common law of the land.

Fifth: That the Federal Court is the proper forum, and habeas corpus the appropriate remedy, wherein and whereby to obtain relief.

As we understand the law, the validity and sufficiency of the foregoing assignment of errors upon the point first to be considered, practically depend upon the solution of one question: Was there any law of the State of Idaho authorizing precautions for felony by "information," in other words, the pith and purpose of every assignment under this point is, did the state court have jurisdiction in the premises.

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ARGUMENT.

First: Section 8 of Article I of the Constitution of Idaho is not self-executing, but requires legislative action before it can become operative.

The first inquiry is whether the constitutional provision relating to prosecutions by information can be made effectual without supplemental legislation. Sec. 8 of Art. I of the Constitution of Idaho, so far as applicable provides:

"No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate."

We assume that here, as elsewhere, the attorneys for appellee will assert that this provision of the constitution is self-executing, and rely upon the illustration used by Mr. Cooley (Constitutional Limitations, p. 100) as to the fifteenth amendment to the Federal Constitution. But neither that illustration nor the principle upon which it is based, is in point here. It may be admitted that many negative and prohibitive provisions in constitutions are, *proprio vigore*, self-executing. This is so because prohibitory legislation to enforce what the Constitution in terms forbids would be no more binding or forcible than the Constitution itself, and therefore the constitutional inhibition requires no legislative aid to effectuate its purpose.

For example, *to the extent* that the Fifteenth Amendment of the National Constitution prohibits any denial or abridgement of the right to vote "on account of race, color or previous condition of servitude," it is self-executing. Of its own force it prevents the states, or the United States, from giving preference to one citizen over another, on account of race, color or previous condition of servitude. But manifestly it does not confer the right of suffrage upon anyone (*U. S. v. Reese* 92 U. S. 214, 217). It is clear that appropriate legislation is absolutely necessary before the right to vote can be affirmatively exercised by anyone. Thus, a constitution may clearly require county and town government; but, if it fails to indicate its range. and to provide proper machinery, it is not in this particular self-executing, and legislation is essential. However imperative the consitutional command that the legislature shall establish a system of town and county government, it is not self-executing and must lie dormant until given

force and operation by statute. (*Ex parte Wall*, 48 Cal., 279, 318.)

Applying the principles relied upon to Section 8, Art. I of the Idaho Constitution, it may be admitted that insofar as that section interdicts the holding to answer of any person for a criminal offense unless on indictment or information as therein prescribed, it is mandatory and prohibitive, and to *that extent* self executing. But that does not reach the question, nor dispose of the contention here. The question is: Is it self-executing to the extent that *ex proprio vigore* —without supplemental legislation—a person may be prosecuted by *information?* Upon reason and authoritity it seems to us that there can can be but one answer to this question: As to prosecutions by *information* it is *not* self executing. It furnishes no means nor method for prosecutions of this character;—it supplies no rules, and points to no procedure established by our jurisprudence either for its own enforcement or for the protection of the rights of the accused.

It is indisputable that somewhere must be found fixed rules for carrying this provision of the Idaho Constitution into effect or there can be no uniformity of procedure. Mr. Justice Cooley (Cons. Lims. 356) says: "*Due process* of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs," therefor *due process of law* is impossible unless "secured by laws operating on all alike and not subjecting the individual to the aribtrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice,"—and it is equally certain that there are but two sources whence the requisite machinery for depriving any person of life or liberty can be derived. It must be found either in the Statutes of the State, or in the common law of England.

To restrain any person of his liberty or deprive him of his property save by a prosecution or suit instituted and conducted according to the *prescribed* forms and solemnities for ascertaining guilt, or for determining the title to property,—is contrary to the

fundamental doctrines of the American people, and specifically in violation of the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the *equal* protection of the laws, or from depriving any person of life, liberty or property without DUE PROCESS OF LAW.

"The object of this limitation upon the powers of the states is to secure to everyone within their jurisdiction, irrespective of color or previous condition, the *equal* protection of the laws, and that everyonce should be judged and have his rights determined by the same rules which are applied to settle the rights of the community." (*Rowan v State*, 30 Wis., 129; S. C. 11 a. m. Rep. 565).

Unless a prosecution or trial is in accordance with *prescribed* forms, and *general* rules for the protection of individual rights or conforms to those *settled* usuages and modes of proceeding, required either by the statutory provisions of the State, or authorized by the common law of England before the immigration of our ancestors,—it is without due process of law, and therefore in disregard of the prohibitions of the Amendment of the Federal Constitution referred to.

As an information for a capital offense was, *prior to the adoption of our National Constitution, unknown to the common law*, (*4 Bl. Com., 309, 310; Hurtado v. California, 110 U. S., 545-6; Exparte Wilson*, 114 *U. S.* 423; *Wharton's Crim. Pr. & Pl. p.* 456; *State v. Boswell*, 104 Ind., 456)—it is clear that no form of pleading, nor law, nor rule as to when, how or where it shall be presented, —that no "settled usage" can be found there.

In these incidents the Constitution of Idaho does not execute tself, and therefore necessarily, it must be vitalized by statutory legislation before it can become operative.

In *State v. Ah Jim*, 9 Mont., 167, the Court on page 172 says:

"It is evident that the clause of the Constitution respecting the informatin does not execute itself. All the details affecting the exercise, jurisdiction, and limitations of the procedure, and the

rights and pleadings of the State and accused, must be defined by the legislative department. It has been observed that the States which have abolished the Grand Jury system have enacted laws to carry into effect this provision of the Constitution, and the following authorities will show their importance: *Rowan v. State*, 30 Wis., 129; *State v. Sloan*, 56 Wis., 647; *Kalloch v. Superior Court*, 56 Cal., 229; *Hurtado v. California*, 110 U. S., 516; *State v. Boswell*, 104, Ind., 541. *In Kalloch v. Superior Court, supra*, the Court says: 'But the Constitution of this State has made provision for this form of prosecution *and the legislature has furnished the machinery to enforce it.* In our opinion the proceeding is a legal and constitutional one.' In *Sloan v. Boswell, supra*, the Court says: 'It seems clear to us that one who is tried and convicted upon an information *provided for by a constitutional state statute* is not deprived of his liberty without due process of law; for we perceive no reason for doubting the soundness of the proposition that proceedings founded upon an information provided for by a *legally enacted statute* do constitute due process of law."

The foregoing propositions seem so fundamentally and axiomatically sound that elaboration or further reference to principle or authority can serve no useful purpose. It was doubtless because of the unassailable logic and law of *State v. Ah. Jim, supra*; to give a practical construction of this provision of the Constitution as not self-executing, and in order to carry it into effect, in harmony with prior and contemporaneous construction and legislation of other States upon this subject, that the Legislature of Idaho during its first session attempted to pass the act known as the Information Act of March 13th, 1891.

SECOND: THE INFORMATION ACT OF MARCH 13th, 1891, WAS AND IS INVALID AND VOID BECAUSE IT WAS NOT PASSED AS REQUIRED BY SEC. 15, ART. III OF THE IDAHO CONSTITUTION. *And herein the court will take judicial notice of the contents of the legislative journals, to ascertain whether the Act was passed according to the forms required by the Constitution to give it validity.*

This appellant was held, tried and convicted under an informa-

tion filed on April 5th, 1897, by the District Attorney of Cassia County, and Sections 8 of Art. I of the State Constitution, supplemented by the Information Act of March 13, 1891, furnish the only authority under which the appellant has been restrained of his liberty and is about to be deprived of his life.

Assuming the correctness of our contention that the constitutional provision is not self-executing, the appellant's trial and conviction was without due process of law, and denied him the equal protection of the laws, and therefore was illegal and void, unless the Information Act was enacted as required by the provision of the Constitution of Idaho relating to the passage of bills.

To this inquiry we now address ourselves:

Section 15, Art. III of the *Idaho Constitution* is as follows:

"No law shall be passed except by bill, nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed, for the use of the members; nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon; provided, in case of urgency, two-thirds of the House where such bill may be pending may, upon a vote of the yeas and nays, dispense with this provision. On the final passage of all bills they shall be read at length, section by section, and the vote shall be by yeas and nays upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of a majority of the members present."

In *Cohn v. Kingsley*, (Idaho), 49 Pac. Rep. 985, it is held that by the terms of said section, *supra* six things must be done in the passage of a law, to-wit:

"First, the introduction of the proposed law by bill, necessarily in writing; second, the printing of the bill, with the amendments thereto; third, the reading of the bill on three several days, in each house, previous to a final vote thereon; fourth, the reading of the bill on its final passage, section by section; fifth, a vote on the final passage, by yeas and nays; sixth, the concurrence of a majority of the members present."

The Court in that case holds these provisions are mandatory;

that it is the imperative duty of the legislature to obey them; that as each House is required by Section 13, Art. III of the Constitution, to keep a journal of its proceedings, such journal must affirmatively show all of the steps taken in each house in the passage of bills; that such journal is the exclusive evidence of what was done, and cannot be contradicted; and unless the journal shows affirmatively that *all* of the Constitutional requirements were complied with,—the act is void in *toto*.

The fact that the bill was signed by the presiding officers of both houses and approved by the Governor may be *prima facie* evidence that the bill is a valid law, but upon inquiry the Court must nevertheless resort to the journals in order to determine whether the constitutional mandates were all obeyed. Those journals are the one final and conclusive test of due passage. They cannot be altered by presumption, nor varied by consent. Their silence as to due performance of the essential conditions imposed by the organic law is fatal. Though the bill may have been duly signed, enrolled, filed and published, it never became a law unless the unaided journals distinctly show that it had gone through all of the forms provided for in the Constitution.

Examine the House and Senate Journal entries set out on pages .....of the Transcript herein in the light of *Section 15, Art. III, and Section 13, Art. III* of the Idaho Constitution as construed in *Cohn v. Kingsley, supra*, and it is manifest that the act of March 13, 1891, never became a valid law, because:

(a). That said bill, with the amendments thereto, was never printed; that neither the amendment thereto, nor the bill as amended, was ever printed for the use of the members of either the House or Senate of said Legislature; that said bill was put upon its final passage before it, with the amendment thereto, had been printed for the use of the members.

(b). That said bill was not read on three several days in each house previous to the final vote thereon; that said bill as amended was *never* read in said House; that said bill as amended was not read three times in the said Senate before the final vote thereon.

(c). There was no case of urgency shown by any Journal entries, authorizing the said Senate to suspend the constitutional provision of said section requiring bills to be read three times on three several days.

(d). That the three several readings, required by said section of said article of said Constitution was never dispensed with.

(e). That said bill on its final passage in said House was not read "at length," nor "section by section."

(f). That on the final passage of said bill in said House the vote was not by yeas and nays.

(g). That on the final passage of said bill in said Senate the vote was not by yeas and nays.

(h). That there was no yea and nay vote upon the final passage of said bill entered upon the journal of said House and the journal of said Senate.

(i). That a majority of the members present in the said House did not concur in said bill as amended by said Senate; that said bill was never concurred in by a majority of the members present in each house of said Legislature.

(j). That said two houses never agreed or came to a common legislative intent as to the provisions of or on the passage of said bill.

As was said in *Cohn v. Kingsley, supra:*

"If either house can disregard one plain provision of the Constitution, then it may disregard all of its provisions, and the Constitution, instead of being the fundamental law of the land, is a mere sham, an idle mockery, a nullity."

It must be said in regard to the Act of March 13, 1891, as the Court said in *Cohn v. Kingsley*, p. 989:

"The conclusions reached, after a careful and full consideration, are, first: To determine the validity of a statute the Court can and should, in the proper case, go back of the enrolled bill to the journals of both houses, to ascertain whether the requirements of the Constitution were complied with by the Legislature in enact-

ing such statute; second: *The Act in question is void in toto*, by reason of the failure of the journals of the Legislature to show a compliance with the requirements of the Constitution in passing said Act."

The rule that the journals may be looked to in order to ascertain whether Constitutional provisions have been complied with is supported, either absolutely or in a modified form, by Alabama, Arkansas, Colorado, Dakota, Florida, Illinois, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshirs, Ohio, Oregon, South Carolina, Tennessee, Virginia, West Virginia, Wisconsin and Wyoming—twenty-three soverign states of the Union. (23 Am. & Eng. Ency. of Law, 208). Examination will disclose the fact that in many of the states where the other view is entertained the organic law does not require the journals of the Legislature to show obedience to its provisions, in which case the presumption arising from due authentication is not overthrown by the journals.

We apprehend that here, as elsewhere, Counsel for appellee will contend that the Act of March 13th, 1891, is now valid and operative for two reasons: First, because, although it may not have been passed in accordance with the requirements of the Constitution, it has long been acquiesced in on the part of the people, recognized by the courts, and the Legislature by amendment, and therefore cannot be now held invalid. To sustain this position they will doubtless rely upon *People v. Alturas Co.*, 55 Pac. 1067. Second, because, as they say, the Supreme Court of Idaho has expressly held that it was and is a valid law. To sustain this position they may rely upon *In re Marshall*, 56 Pac., 470.

We respectfully submit that neither of the cases which we assume will be relied upon supports such contentions.

The case of *People v. Alturas County*, 55 Pac., 1067, is not in point. The conclusion reached in that case is expressly based upon a rule of estoppel, demanded by principles of public policy. The Court held there that under the conditions surrounding the case it should not be held subject to the same rules as ordinary acts of legislation. The Court there fully and emphatically repud-

iated the doctrine that a legislative act which is void at the time of its passage, because not passed in the manner required by the Constitution, *can ever ripen into a valid act by the mere lapse of time.*

The ground of that decision was that inasmuch as the Court, in the case of *Blaine County v. Heard*, 45 Pac., 890, had held the Act creating Alturas County constitutional, and the people had acted on the theory that said Act was valid, adjusting their business accordingly, and its valid existence had been recognized by every branch of the State Government, and said county having funded a legal indebtedness inherited from other counties, and sued and recovered as a county, and received from other counties large sums of money,—public policy and sound principles of law required that the State be held *estopped* from questioning the manner of the passage of the Act then in question. In that case property rights and contractual relations were involved, and therefore the doctrine of "estopped" was held applicable. Here it is not.

It is apparent, therefore, that the decision in *People Alturas County*, was made upon points not applicable here, and has no binding force in this proceeding which is between different parties, and upon propositions neither presented nor considered in that case. (*Nickey v. Stearns Ranchos Co.*, 126 Cal., 150; *In re Irrigation Dist.*, 117 Cal., 382; *City Council v. Fowler*, 48 S. C. 8).

In *in re Marshall*, 56 Pas. 470, the constitutionality of the Act of March 13th, 1891, *was not involved*. The question there was whether the Act approved March 6th., 1893,) which amends the Information Act of March 13th, 1891) was passed in the manner rsquired by the Constitution, and the Court refused to decide upon the validity of that amending Act, because that question was not necessary to a determination of the case, and a question involving the construction of the Constitution will not be considered where the case can be determined upon other grounds (*Commissioners v. Mayhew*, 51 Pac., 411, *State v. Ridenbaugh*, 51, Pac., 750; *State v. Baker*, 56 Pac., 81).

It is true that Justice Quarles, in the decision, does say: "If

the Act of March 6th., 1893, is void, the Act of March 13th., 1891, is valid"; but it is clear that he does not mean to be understood as passing upon the constitutionality of either Act. In fact, he expressly declines to consider the question whether the Act of March 6th., 1893, was passed as required by the Constitution, because unnecessary to the decision, and the validity of the other Act was not involved in any manner.

Not being questioned the Court had the right to presume it valid. (*Duncan v. McCall*, 139 U. S., 449; s. c., 11 Sup. Ct. Rep., 576.) But what was said in reference to the Act of March 13th., 1891, was concerning a matter dehors the record and the case, and therefore *obiter dictum*, without weight or binding froce. (*Wis. Centeral R. R Co., v Price County*, 133 U. S., 496.)

In the case of *Cohn v. Kingsley*, 49 Pac. 985, Justice Quarles, both in his original opinion, in July, 1897, and in his opinion on rehearing, in August, 1897, expressly, emphatically, and at great length announced that a law was void because compliance with the constitutional requirements relative to its passage did not affirmatively appear by the Journals of the Legislature; and reiterated his allegiance to those opinions, and reaffirmed the soundness of the principles there laid down in January, 1899, in *People v. Alturas County*, 55 Pac. 1067.

It is an unwarranted affront to his judicial learning and general intelligence to assume that in March, 1899, (*In re Marshall*) he incontinently, unnecessarily and deliberately overruled a case, destroying a legal fabric and annihilated important principles, which he had so shortly before been at such intellectual pains to decide, build and vitalize.

The ruling of an Appellate Court is only authority upon the points expressly raised and expressly passed upon. A mere dictum in an opinion, not essential to the decision, is not authoritative or binding.

Some years ago Congress passed an Act protecting trade marks, Many cases arose under this, and, no question of constitutionality being raised, the Federal Courts adjudicated the rights of parties under it, on the assumption that it was constitutional. (10 Blatch.,

85; 13 Blatch., 458; 11 Blatch., 310; 2 Sawy, 78.

McLean v. Fleming, 96 U. S., 245, was an action to restrain infringement of trade mark under the Act. Injunction granted and the defendant appealed. The Court says, page 248, in affirming the judgment:

"Protection for trade marks may be obtained by individuals, firms and corporations entitled to the same if they comply with the requirements prescribed by the Act of Congress; and the provision is that a trade mark, duly registered as required, shall remain in force thirty years from the date of such registration, subject to an exception not necessary to be noted."

This wou'd seem to be as explicit a recognition of the validity of the Act as could be made short of an express declaration to that effect, yet in the *Trade Mark Cases*, 100 U. S., 82, although the Attorney General cited *McLean v. Fleming*, as affirming the constitutionality of the Act, the Court promptly held it to be unconstitutional.

In the face of this it is idle to claim that a decision of an Appellate Court is authority for anything but the points actually contested, and directly and expressly decided by it.

The rule for the determination of the validity of any act of the Idaho Legislature has been clearly announced and firmly settled by *John v Kingsley*, *supra*. That rule has never since been modified or restricted in its operation, and as stability and certainty in the law are of the first importance, it follows that when a Court has once laid down a principle of law as applicable to a certain state of facts, for the sake of that stability and certainty it will apply that principle to all future cases where the facts are substantially the same. (*Moore v. Albany*, 98 N. Y. 410; *N. W. Forwarding Co. v. Mahaffey*, 36 Kan. 157; *White v. Bruman*, 1 Oh. St, 115.)

The rule in *John v. Kingsley* is that when a contest arises whether an act was constitutionally passed, the journals may be appealed to to settle it, and by the journals the act must stand or fall,—that when the validity of a statute is attacked, the failure of the journals to show that any constitutional requirement was

obeyed is conclusive evidence that such requirement was not obeyed, and the act is therefore unconstitutionally passed and void.

We have attacked the validity of the Act of March 13th, 1891. We have introduced in the record a transcript of the journals of both houses of the Idaho Legislature, certified by the Secretary of State to be full, true and comple. This is the correct, practice, commended by *Cohn v. Kingsley*, p. 989.

The practice of making the journals a part of the record is doubtless commended because of the distinction which that Court recognized between matters of which the Court will take judicial cognizance "immediately, *suo motu*" and those which it will not notice" until its attention has been formally called to them." (Gres. Eq. W., 292,306), when it will investigate so as to refresh its memory and inform its conscience; apply its judicial knowledge, and adopt them as its own evidence, independent of the parties. (*Jones v. United States*, 137 U. S. 102, 216.) The journals are here and the most cursory inspection of their contents demonstrates a startling disregard of the constitutional requirements; that, save as to the original introduction of the act, not a single constitutional mandate was observed in its passage.

By the inexorable logic of the situation the Act of March 13th, 1891 is null and void; void anywhere, everywhere; in any court, State or Federal.

Reviewing the presumptions and adjudications stated, our contentions are:

1. The presumption of validity attaching to a duly certified and regularly enrolled bill may be overthrown by a reference to the journals, and in this case, by such reference, the presumption has been met and overcome by an abundant proof as well as judicial knowledge of invalidity.

2. That the Federal Court cannot be bound by a decision of the Supreme Court of Idaho that the Act of March 13th, 1891 is valid, because no such decision has ever been made. The question of the validity of that Act has never been raised in the State

Supreme Court. But the Federal Court *is* bound to follow the *state rule* that where the legislative journals fail to affirmatively show obedience to the constitutional requirements relating to the passage of bills, the act is void.

If it be said that the state court has not directly declared this particular law—the Act of March 13th, 1891—invalid, the answer is that the Supreme Court of Idaho, in *John v. Kingsley*, has fully developed and finally settled the constitutional requirements of that state relating to the passage of bills; that the state of Idaho in that case has clearly and unmistakably adopted a GENERAL RULE *that no act is valid unless passed as required by Sec. 15 of Art. III of the Stste Constitution*, and that, when questioned, the legislative journals must affirmatively show that the act was passed according to the forms and conditions imposed by the constitution to give it validity; that the state having thus declared its rule for ascertaining whether any act attacked is valid or void, such rule is binding upon and must necessarily be adopted by the courts of the United States, (*Town of South Ottawa v. Perkins*, 84 U. S., 267; *Post v. Supervisors*, 105 U. S., 667; *Railroad Co v. Georgia*, 98 U. S. 357; *Baldwin v. Kansas*, 129 U. S., 52, 57; *N. Y. Life Ins. Co. v. Board of Comm.* 99 Fed. 855; *Norton v. Selby Co.*, 118 U. S., 425; *Claiborne v. Brooks*, U. S., 400—410; that the petitioner has challenged the validity of the Act of March 13th, 1891; the journals are before the court; the facts are uncontroverted—admitted; that the result of those facts is a pure question of law for the court to determine (*Territory v. Clayton*, 18 Pac. 630).

The Supreme Court has said that where such facts appear, or rather that where full observance of the constitutional requirements does not appear, by the journals, the act never became a law.

In *Town of South Ottawa v. Perkins*, 94 U. S., 269, where the due passage of an act of the State Legislature was drawn in question, the court, on p. 268, says:

"When once it became the settled construction of the Constitution of Illinois that no act can be deemed a valid law, unless, by the journals of the legislature it appears to have been regularly

passed by both houses, it became the duty of the courts to take *judicial notice* of the journal entries in that regard, * * * the question of the existence of a law is a *judicial* one, and must be so regarded by the courts of the United States." (Callaghan v. Chipman, 59 Mich. 610, 617; Atty. Genl. v. Rice 64 Mich. 385.)

Hunter v. N. Y. etc. R. R. Co., 116 N. Y. 615

Rudgers v. Cady, 104 Cal. 288.

Comstock v. Tracy, 46 Fed. 162.

So that, independent of the establishment of the fact by proof that the bill was not constitutionally passed, this court judicially knows that the Information Act under consideration was not passed in accordance with the state constitution, and, conformable to the construction given by the highest state court to its constitution, it is void.

The *Railroad Tax Cases*, 13 Fed. 722, was a case involving the validity of a state statute, without which the property of the defendants would have been taken without due process of law. The position of the defendants there was in all respects analogous to, though in some respects not so strong as, that occupied by the petitioner here. There the authority conferred by a constitutional provision which was not self executing was involved; so here. There the statute in question had been passed to furnish machinery for carrying into effect the constitutional provision; so here. There the validity of the particular statute in question had never been considered by the state tribunal; so here. There it was claimed that the statute never became a law because the journals did not show a compliance with the provisions of the state constitution relating to the passage of bills; and so here.

The point of dissimilarity and the situation which makes this case stronger than the California case is that there, under the constitution of 1849, the Supreme Court of that state, in *Sherman v. Story*, *supra*, had decided that an act of the legislature, properly enrolled, autenticated and deposited with the Secretary of State, is a record which is conclusive evidence of the passage of the act, and that the act passed as enrolled. No other rule had been announced in California, but the Federal Court held that as that

state had changed its constitution—had substantially adopted the Illinois constitutional provision relating to the passage of bills.—it must be deemed to have adopted with the provision the settled construction put upon it by the courts of the state from which it was taken, which in Illinois made the journals the final and conclusive test by which the validity of the attacked statute should be ascertained. So that when the *Railroad Tax Cases* were decided by the Circuit Court, the rule that the journals might be examined existed only by presumption, while in Idaho such rule has been clearly and emphatically announced and adopted.

The court examined the journals; ascertained that it appeared therefrom, that they did not show obedience to the constitutional requirements, and by Sawyer, Judge, the same judge who delivered the opinion in *Sherman v. Story*, on page 767, said:

"The bill, therefore, never was constitutionally passed, and never became a law. *Whether the bill became a law or not is a question of law of which the court will take judicial notice. Sherman v. Story, 30 Cal. 253; Ottawa v. Perkins, 94 U. S., 268; Gardner v. The Collector, 6 Wall. 509, 510; Post v. Sup'rs, 105* U. S. 667 Under the decisions of the courts upon constitutional provisions in all respects similar to that in the present constitution of California, *it is settled that the court, to inform itself will look to the journals of the legislature. So the Supreme court of the United States holds where it is so decided by the State Courts in construing their own statutes.* See last cases cited."

The same view is expressed in *County of Santa Clara v. Southern Pac. R. R. Co.*, 18 Fed. 427-8.

The RULE of *Cohn v. Kingsley* that *no* act is valid unless the legislative journals affirmatively show strict obedience to the constitutional mandates relating to its passage, coupled with the demonstrated fact, and judicial knowledge of this Court, that the journals fail to show that the Act of March 13, 1891, was passed (in other words, show that it was not passed) according to the forms required by the State constitution to give it validity,—is the precise equivalent of a decision by the Supreme Court of Idaho that the act in question is void. By *that rule* that act must fall as

unconstitutionally passed, and the Federal Court are as firmly bound by the rule as they would be by an actual decision of invalidity of this particular act. As is said in *Town of South Ottawa vs. Perkins*, 94 U. S. 267:

"It would be a very unseemly state of thing, after the courts of Illinois have determined that a pretended statute of that state is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise.

It is declared by the Judiciary Act as a fundamental principle 'that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.' Sec 34. And this Court has always held that the laws of the state are to receive their authoritive construction from the state courts, except where the Federal Constitution and laws are concerned; and the state constitutions in like manner, are to be construed as the state courts construe them This has been so often laid down as the proper rule, and in itself so obviously correct that it is unnecessary to refer to the authorities.

*If, therefore, the law in question had never been passed upon by the state courts, the courts of the United States would nevertheless be bound to give to the constitution of Illinois the same construction which the state courts give to it, and to hold a pretended act of the legislature void and not a law which the state courts would hold to be so.*

THIRD—THERE BEING NO LAW FOR PROSECUTIONS BY INFORMATION IN CAPITAL CASES, THE STATE COURT WAS WITHOUT JURISDICTION, AND THEREFORE,

FOURTH—THE TRIAL, CONVICTION AND SENTENCE OF PETITIONER WERE ILLEGAL, NULL AND VOID, AND CONTRARY TO THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

But we are told that because Section 8 of Article I of the Idaho Constitution provides that no person shall be held to answer save

upon indictment *or information*, the District Court which tried the petitioner was not wholly without jurisdiction, and consequently the objection to a trial by information constitutes but mere error which should have been raised in the nisi prius court, and thence by appeal determined by the Supreme Court of the State.

We do not so understand the law. The power of the state court to try persons accused of crime can only be exercised in the manner and under the limitations and restrictions provided by the law.

The Supreme Court of the United States has often determined what constitutes jurisdiction, and what its exercise. The unqualified rule is that where there is no power to hear a cause, there is no jurisdiction; it is *coram non judice* whenever a demurrer on this ground to the case presented should be sustained. Whether on an answer putting in issue the allegations of the complaint, the complainant makes out a case, is the exercise of jurisdiction,—which, however, is only conferred and can only be *properly* exercised under a complaint containing all requisites and filed in the manner required by law.

"The jurisdiction of the court cannot depend upon its decision upon the merits of the cause brought before it, *but upon the right to hear and decide it at all.*" (*Ex parte Watkins*, 7 Pet. 572; *U. S. v. Arredondo*, 6 Pet.. 709; *Rhode Island v. Mass.* 12 Pet. 718; *Kendall v. U. S.* 12 Pet. 623.)

Infractions of the law can only be punished or remedied as authorized by law. The courts derive their power and authority wholly from the law and can proceed no further nor in any other manner than warranted by its provisions. If the law does not confer the power to render judgment *under the pleading filed*, any movement by the court over the subject matter or party is unsupported by law, extra judicial, without jurisdiction, and therefore void.

For example, if, in a civil action, the complaint does not show jurisdiction over the subject matter of a cause in personam, or, if showing jurisdiction, the court proceeds without service upon or

appearance of the defendant as required by law, its judgment is a nullity, as no court can in the ordinary administration of justice, exercise jurisdiction over a party unless he voluntarily appears, or is served with process within the jurisdiction of the court.

In this case, as the constitutional section relied upon is *not* self executing, it remains dormant until vitalized by appropriate legislation, and as no valid law was ever passed to carry it into effect, the court was wholly without power to proceed by information, and hence without any jurisdiction whatever.

*In ex parte Milligan*, 4 Wall. 2, on habeas corpus to discharge from unlawful imprisonment, the controlling question was:

Upon the facts appearing, had a military commission *jurisdiction* to try, convict and sentence the petitioner Milligan. The court held that the constitutional guaranty of trial by jury had been violated and discharged the prisoner. The inalienable right of every man charged with crime to be tried according to the law of the land is thus stated by Mr. Justice Davis on pp. 118, 119:

"No graver question was ever considered by this court, nor one which more clearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crime may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings."

Jurisdiction is not only the power to hear and determine, *(Grignon v. Astor*, 2 How., 338; *ex parte Watkins*, 7 Pet., 572; *U. S. v. Arredondo*, 6 Pet., 709; *State of Rhode Island v. State of Mass.*, 12 Pet., 718; *Kendall v. U. S.*, 12 Pet., 623); but also the power to render the particular judgment actually rendered,—which must

flow from authority conferred by law, and be exercised in accordance with the established modes of procedure (*Windsor v. McVeigh*, 93 U. S., 274, 282, 283; *ex parte Siebold*, 100 U. S., 371.) That is the point here; the power to render the particular judgment rendered in this case,—a power which could be exerted only under, and which did not transcend, the law and established rules of procedure applicable to it; and upon this point it is the case last cited which declares that a conviction under a void law is not merely erroneous, but absolutely void, and can furnish no ground for imprisonment or punishment.

Even should it be assumed that some sort of jurisdiction is conferred by the constitutional authorization to prosecute by information, (which is not the case, because, as we have seen, supplemental legislation is absolutely essential to give any effect whatever to the permissive provision), the trial, conviction and sentence of appellant would still be void because not conducted and imposed by virtue of any established mode of procedure, or according to any rules of law applicable to the case. As a complete answer to the position that any sort of jurisdiction will render any sort of judgment impregnable to collateral attack, we refer to the opinion of *Mr. Justice Field*, in *Windsor v. McVeigh*, supra, where he holds on pp. 282, 283:

"All courts, even the highest, are more or less limited in their jurisdiction. * * * * Thought the court may possess jurisdiction of a cause, of the subject mattter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgment. It must act judicially in all things and cannot transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penetentiary upon the defendant. If the action be for libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * * The judgments mentioned, given in the cases supposed, would not be

merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. * * * *

So a departure from established modes of precedure will often render a judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is that the courts are not authorized to exert their power in that way."

In short, and for illustration sake, we may say that although a State Superior Court is constitutionally empowered to try and punish persons accused of felony, it can only exercise such power in a manner sanctioned and permitted by the "settled maxims of the law, and under such safeguards for the protection of individual rights" as the law prescribes. The jurisdiction of a court to try a man for murder cannot be arbitrarily exercised; he cannot be tried without a written accusation, nor without a jury, nor otherwise than *within the power and limitations of that jurisdiction.*

But it is unnecessary for us to argue as though the Court only *exceeded* its jurisdiction, because the Idaho Constitution as to prosecutions by *information* amounts to no more than a mere permission to the legislature. That permission or power was never exercised as required by the same Constitution. The attempt made failed, the Constitutional provision remains dormant, and consequently the Courts never required any jurisdiction.

There being no vitalizing statute, and the Constitution being inoperative, there was *no* law for the trial and conviction of appellant by information, and the whole of the proceedings must fall.

In *ex parte Royal* 117 U. S., 248, the Court said:

"It is clear that, if the local statute under which Royal was indicted be repugnant to the Constitution, the prosecution against him has nothing on which to rest, and the entire proceeding against him is a nullity."

Nor can there be any doctrine of waiver or estoppel invoked.

An objection of this character was introduced in the case of *Town of South Ottawa v. Perkins*, 94 U. S., 260, and was thus disposed of by Mr. Justice Bradley:

"We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party, a law to-day and not a law to-morrow; a law in one place, and not a law in another in the same State. And whether it be a law, or not a law, is a judical question, to be settled and determined by the Courts and Judges. The doctrine of estoppel is totally inadmissible in the case."

In cases of a character like the one at bar the principles of estoppel can never be applied. Here no mere right of property, but the sacred right of life and liberty are involved.

"In a criminial case against a party he may waive certain things but he cannot waive a fundamental right affecting the very jurisdiction of the Court to try him. And, even though he may have attempted to waive such right, in a case where he has been found guilty and is imprisoned, he may sue out a writ of habeas corpus, and obtain his release, because he has been tried and convicted without due process of law, and against the Constitution and laws of the United States. Syllabus by the Court in *Ex parte McClusky*, 40 Fed., 72."

In the case just quoted from the petitioner had been charged with larceny by *an information;* was arrainged before the Court, and there pleaded guilty; was sentenced to imprisonment by the Court, and was incarcerated under the judgment when the application for the writ was made. The Court on Pages 74–5 of the opinion says:

"*No man or no power has the right to take away another's liberty, even though with consent, except by due process of law.* Due process of law * * * means compliance by the government with a

fundamental requisite. Such as that the party shall be charged with the crime in the way provided by the Constitution and Laws of the United States. Liberty under such Constitution and Laws is an inalienable prerogative, of which no man by mere agreement can divest himself; any divestiture not occurring by due process of law is null. *(1 Whart. Crim. Law.* (9th Ed.) Sec. 145.)"

FIFTH: HABEAS CORPUS IS THE APPROPRIATE REMEDY, AND THE FEDERAL COURT THE PROPER FORUM WHEREBY AND WHEREIN TO OBTAIN RELIEF.

Where jurisdiction is questioned, a party cannot be estopped or prevented from taking the objection at any time or in any court, for it is an objection which lies at the foundation of the whole case. *(Colemans App., 75 Pa., St., 441, 461; Doctor v. Hartman, 74 Ind. 221; Mathie v. McIntosh, 40 Wis., 120; Thompson v. Steamboat, 2 Oh. St., 26; 12 Am. & Eng. Ency. of Law, 306,307.)*

A judgment entered by a Court without jurisdiction is void, and will be so held in a collateral proceeding. (Dynes v. Hoover, 20 How., (U. S.) 6580).

Jurisdiction may be inquired into by habeas corpus, and the prisoner discharged if no jurisdiction, appears, or if jurisdiction is negatived by the record. *(Ex parte Mirande, 73 Cal. 363).* In *Ex parte Siebold*, 100 U. S. 371, it is well said that:

"An unconstitutional law is void, and is no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."

There may be no appeal, but

"The question of the Court's authority to try and imprison him may be reviewed on *habeas corpus*,"

Whatever the conflict of authority or disinclination of the courts has been in the past to look into the constitutionality of a statute in habeas corpus proceedings to determine whether a person was lawfully convicted, the uniform practice has been, since the decision quoted from, to entertain jurisdiction for the purposes men-

tioned. In *Ex parte Walter Smith*, 135 Mo. 33 L. R. A. 606, the courts says:

"So that it may now be regarded as the established doctrine of this court that it will interfere by means of the writ of habeas corpus to look into and investigate the constitutionality of a statute or ordinance on which a judgment which results in the imprisonment of a petitioner is founded. *And if it be true, as it must be true, that an unconstitutional law is no law, then its constitutionality is open to attack at any stage of the proceedings, and even after conviction and judgment*, and this is upon the grounds that no crime is shown, and therefore the trial court had no jurisdicrion, because its criminal jurisdiction extends only to such matters as the law declares to be criminal; and if there is no law making such declaration, or, what is tantamount thereto, if that law is unconstitutional, then the court which tries a party for such an assumed offense transcends its jurisdiction, and he is consequently entitled to his discharge, just the same as if the nonjurisdiction of such court should in any other maner be made apparent." (Citing *Church, Habeas Corpus*, 2nd Ed. sec. 83, and cases cited in Note 2; Id. §§ 245 a, 325, 349, 351, 352, and cases cited; *Thompson v. Bunton*, 117 Mo. 83, 20 L. R. A. 462.)

A want of jurisdiction renders every pretended legal proceeding an absolute nullity. Habeas Corpus is the great writ of liberty, and it is its appropriate office to search out defects of jurisdiction whereby any person is sought to be detained in apparent legal custody. As the question of jurisdiction is the especial subject of inquiry in such cases, the writ may always be used to procure the discharge of prisioners where the record of a court of limited jurisdiction does not affirmatively show that jurisdiction was rightfully exercised, or where the record of a court of general jurisdiction, negatives jurisdiction.

Whatever the presumptions as to the regularity and validity of the proceedings of a Superior Court, they are overcome by showing:

1. That it was not proceeding within the general scope of its powers.

2. *That its records state the facts, and such facts are not sufficient to give the Court jurisdiction, or jurisdiction is negative by the record. (Hahn vs. Kelly, 34 Cal. 402, Tustin v. Gaunt,* 4 Oregon, 305; *Greenstreet v. Thornton,* 60 Ark. 374; *Settlemeir v. Sullivan,* 97 U. S., 444; *Richards v. Ladd,* 6 Saw. 40; *Harris v. Hardeman,* 14 How. 334; *Clark v. Thompson,* 47 Ill., 25. S. C., 95 Am. Dec., 457; *Barber v. Morris,* 37 Minn., 104 S. C. 5 Am. St., Rep., 836; *Ray v. Ray,* 1 Idaho, 576; *Pioneer Etc. Co., v. Maddux,* 109 Cal., 640; *Kochler v. Hill,* 60 Iowa, 632; *Davidson v. Clark,* 7 Mont., 101; *Morey v. Morey,* 27 Minn., 267.)

It could serve no useful purpose for appellant to apply to the state rather than the federal tribunal for relief. There is no question of the construction of a state statute involved. The State court has already construed its constitution concerning the passage of bills, and by such construction has imposed upon every court the duty of following such construction. The trial of appellant has been fully concluded and his appeal finally determined, so there is no "ordinary administration of justice" to obstruct. We do not complain now of any infringement of state laws, but do complain, not only that the trial, conviction and sentence of appellant were inconsistent with the freedom of an American citizen and repugnant to the principles of natural justice, but specifically that the fundamental law of the nation has been violated in restraining the petitioner of his liberty without due process of law,—without any jurisdiction whatever, and therefore contrary to the 14th Amendment of the United States Constitution.

It is indisputable that the courts of the United States have power to issue writs of habeas corpus for the power of inquiring into the cause of restraint of liberty of any prisoner who "is in custody in violation of the Constitution or of a law or treaty of the United States." (*Rev. Stats.*, 751, 755, 761; Acts March 2nd, 1883, C. 57, Sec. 7; (4 Stat., 634); Aug. 29, 1842, C. 257; (5 Stat., 439); Feb. 5, 1867, C. 28, Sec. 1; (14 Stat., 385).

As was said by Judge Sawyer in *In re Ah Jow,* 29 Fed. 183. "The party being in custody in violation of the Constitution of the United States, this Court has jurisdiction to discharge him on

habeas corpus notwithstanding the fact that he is held by authority of a judgment of a state court. (*Rev. St., Sec.* 753; *Ex parte Royal*, 117 U. S., S. C., 6 Sup. Ct. Rep., 734); and the case is one in which this Court, in the exercise of a sound discretion, should discharge the petitioner."

"*There are no reasons peculiar to the case that would justify putting the party to the expensive and tedious process of pursuing his remedy through all the Courts; and, if necessary, by appeal to the Supreme Court at Washinguon, 3000 miles away. To require this in a case that seems clear would be equivalent to a total denial of justice.*"

To enforce the Constitution of the United States "does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time.

"In that case the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, * * * * shall be the supreme law of the land.'" (Cunningham v. Neagle, 135 U. S., 1 S. C. 10 Sup. Ct. Rep., 658, 667).

This is not a question of the right of a state to prosecute by information, being authorized by its constitution, and furnished with appropriate and adequate machinery by its Legislature. We cheerfully concede that every State has the right to regulate the forms of pleadings and process in civil and criminal cases, and to determine what shall be deemed a sufficient indictment, information, affidavit, or declaration in its own courts; it may require, in criminal prosecutions, "a statement of the acts constituting the offense in ordinary and concise language" or, "in such manner as to enable a person of common understanding to know what is intended", or permit an offense to be charged "in the language of the statue creating it", or it may demand that "the acts constituting the offense shall be set forth with the same detail and particularly as would be required in indictments by the common law."

In any such case irregularities affecting the prosecution of a defendant would constitute but mere error, which should be raised in the trial court, and determined by appeal in the highest court

of the State. Or if the right to prosecute by information depended upon a *construction* of the state statute, then the Federal Courts might well exercise their discretion against issuing the writ on the ground that such an application would tend to "obstruct the ordinary administration of the criminal laws of the State," as held by Judge Hawley in *In re Huse*, 25 C. C. A. 1.

But here the Constitution of Idaho does not furnish "the details affecting the exercise, jurisdiction and limitations of the procedure, or the rights and pleadings of the State and accused," (*State v. Ah Jim*, 9 Mont. 172), and there is absolutely no State legislation upon the subject, the Act of Marth 13th, 1893, being void.

Can one prosecuting officer adopt the legislative procedure of one state, and another of another; or shall the pleadings in capital cases be arbitrarily formulated to suit the varient fancies of the several district attorneys, or be controlled by the absolute discretion of the *nisi prius* judges of the states? How, when and where shall the information be filed, who will determine its character and sufficiency? Whence come the "uniformity" and "equal protection," pledged by the organic law of the Union? *Equal* protection is the *same* protection under the same circumstances; all are to stand alike in like intrinsic conditions. How can there be equal protection without uniformity of procedure?

With no legislative enactment to carry out the constitutional provision authorizing prosecutions by information, and no settled usages and modes of procedure existing under the common and statute law of England at the time of the immigration of our ancestors, or at the foundation of our government, the fundamental right and immunities guaranteed by the Fourteenth Amendment of the Federal Constitution are immediately and grossly transgressed by such deprivation of liberty as the petitioner here complains of.

We respectfully submit that no rule of comity, no principle of judicial propriety, should require the appellant to appeal to the State Court or prevent this court from declaring that the Constitu-

tion of the United States has been violated, and that appellant must be discharged.

Edgar Wilson,

Respectfully Submitted,
JAMES H. HAWLEY, and
J. W. DORSEY,
of Counsel for Appellant.